STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 19, 2017
v	No. 330136 Wayne Circuit Court
MELVIN JONES, a/k/a ELLIOT RIVERS, a/k/a SHAKIR ABDUL HALIM BEY, Defendant-Appellant.	LC No. 14-008920-01-FH

Before: SAAD, P.J., and METER and MURRAY, JJ.

PER CURIAM.

Defendant appeals as of right from his jury-trial conviction of possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(*iv*). The trial court sentenced him to 42 to 240 months' imprisonment. We affirm the conviction and remand this case for further proceedings related to sentencing.

FACTUAL BACKGROUND

A woman summoned a Detroit police officer and his partner as they were patrolling a neighborhood and informed them that a man dressed in white named Elliot was selling cocaine near the corner of Vernor and Vinewood streets. The officers drove to the vicinity and observed defendant, who matched the description given by the woman, standing outside a church near the subject intersection. Upon seeing the officers, defendant began to walk around the side of the building. After being ordered to stop, defendant identified himself as Elliot, but became evasive and began to turn away when one of the officers inquired if he was selling narcotics. One officer grabbed and detained defendant and, during a search for weapons, felt a "squishy object" in defendant's pocket. Upon removing the object, he discovered that it was a sandwich bag containing several smaller bags of cocaine. The officer arrested defendant, and during processing discovered another bag of cocaine on defendant's person.

PRIMARY BRIEF

Defendant first contends that the trial court failed to comply with the requirements of case law and the court rules when it secured his waiver of the right to counsel. This Court reviews de novo whether a defendant waived his Sixth Amendment right to counsel, but reviews

for clear error any factual findings underlying the trial court's decision. *People v Williams*, 470 Mich 634, 640-641; 683 NW2d 597 (2004). We give due respect to the trial court's assessment of credibility. *Id*. "Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Johnson*, 466 Mich 491, 497-498; 647 NW2d 480 (2002). Defendant also contends that the court failed to reaffirm his decision to waive the right to counsel at all subsequent proceedings. However, defendant did not preserve this issue below, so our review is for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Lane*, 453 Mich 132, 140; 551 NW2d 382 (1996).

A person accused of a crime and facing the possibility of incarceration has a constitutional right to have the assistance of a lawyer at every critical stage of the criminal process. *Williams*, 470 Mich at 641. "The United States Constitution does not, however, force a lawyer upon a defendant; a criminal defendant may choose to waive representation and represent himself." *Id*.

When confronted with a defendant who wishes to represent himself or herself, a trial court must determine that the three requirements stated in *People v Anderson*, 398 Mich 361; 247 NW2d 857 (1976), have been met; the court must ensure that the defendant's request is unequivocal; that he or she "is asserting the right knowingly, intelligently, and voluntarily after being informed of the dangers and disadvantages of self-representation;" and that the defendant's self-representation request "will not disrupt, unduly inconvenience, and burden the court and the administration of the court's business." *People v Willing*, 267 Mich App 208, 219; 704 NW2d 472 (2005). Similarly, a trial court "may not permit the defendant to make an initial waiver of the right to . . . a lawyer" unless the trial court first advises him or her "of the charge, the maximum possible prison sentence . . . , any mandatory minimum sentence . . . , and the risk involved in self-representation," and offers "the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer." MCR 6.005(D).

Trial courts must substantially comply with the requirements stated in *Anderson* and MCR 6.005(D). *People v Adkins (After Remand)*, 452 Mich 702, 726; 551 NW2d 108 (1996), overruled in part on other grounds by *Williams*, 470 Mich at 641 n 7. "Substantial compliance requires that the court discuss the substance of both *Anderson* and MCR 6.005(D) in a short colloquy with the defendant, and make an express finding that the defendant fully understands, recognizes, and agrees to abide by the waiver of counsel procedures." *Adkins*, 452 Mich at 726-727. "The nonformalistic nature of a substantial compliance rule affords the protection of a strict compliance rule with far less of the problems associated with requiring courts to engage in a word-for-word litany approach." *Id*. at 727. The Michigan Supreme Court has stated that the substantial compliance standard "protects the vital constitutional rights involved while avoiding the unjustified manipulation which can otherwise throw a real but unnecessary burden on the criminal justice system." *Id*. (citation and quotation marks omitted).

Defendant's counsel, Ronald Weitzman, made an appearance on the first day of trial, but defendant stated that he had chosen to represent himself. The trial court inquired if defendant understood that he had the right to an attorney and that if he represented himself, Weitzman could assist him. Defendant replied, "Well, I don't really understand that, but I will agree to

stipulate to that." The trial court asked if defendant understood that he was being charged with delivery or manufacture of less than 50 grams of cocaine. Defendant responded, "No. I was never, something was never done in regards to that charge." Defendant elaborated that he never received a copy of the complaint, a signed information, or a warrant related to that charge. The trial court informed defendant that the signed information was in the file and that an officer would hand him a copy of it; the record adequately reflects that defendant received a copy of the information. The trial court asked defendant if he understood that the possible penalty was 20 years in prison. Defendant initially responded "[y]es," but the court stated, "I'm sorry," after which defendant stated, "No, I don't understand that." The trial court asserted that "the [i]nformation will indicate that to you." Next, the court inquired whether defendant understood that he was being charged as an habitual offender and that the "punishment may be twice the maximum sentence" if he were convicted; defendant asserted that he understood. Then the court inquired whether defendant understood that he could consult with "the attorney during these proceedings," and defendant indicated he did not, but the trial court explained, "And I'm telling you can [sic] consult with the attorney during these proceedings." Finally, the court inquired if defendant understood that he must follow the rules of evidence, and when defendant indicated that he did not, the court responded, "Okay. I'm telling you you are."

Defendant's appellate arguments suggest that the above was the only exchange related to his waiver of counsel, but this is not the case. During a pretrial conference[1] on April 8, 2015, when the present case was consolidated with another, defendant first expressed his desire to represent himself, and the predecessor trial judge[2] engaged in a lengthy colloquy with defendant during which the judge set forth the seriousness of such an action and defendant clearly stated that he wanted waive his right to an attorney.

There was substantial compliance with *Anderson* and the court rule. With regard to the first prong of *Anderson*, defendant's request to represent himself was unequivocal. With regard to the second prong, the trial court assured that defendant waived his rights knowingly, intelligently, and voluntarily. The United States Supreme Court has characterized a knowing and intelligent waiver of counsel as one made where the defendant "knows what he is doing and his choice is made with eyes open." *Iowa v Tovar*, 541 US 77, 88; 124 S Ct 1379; 158 L Ed 2d 209 (2004) (citation and quotation marks omitted). There is no indication that defendant was unable to read and thus to understand the words written in the information, to which the trial court referred. The trial court advised defendant that he would have to conform with the rules of evidence, and the arguments defendant subsequently made before jury selection, about the complaint and warrant, showed that defendant understood that he was representing himself; he was attempting (albeit unsuccessfully) to find a technicality on which to get his case dismissed. In addition, and significantly, the predecessor trial judge, during the pretrial conference, had a comprehensive colloquy with defendant during which the predecessor trial judge explained the

[1] We note that this conference is listed on the register of actions for the present case and the lower court number for the present case appears on the transcript of the conference.

[2] We use the phrase "predecessor trial judge" to distinguish this earlier judge from the "trial court" or "court" that presided over the trial at issue in this appeal.

seriousness and dangers of self-representation; defendant unequivocally asserted that he wished to represent himself. With regard to the third prong of *Anderson*, there was no evidence (and defendant points to none) to indicate that defendant would burden the court. Defendant appears to be contending that the trial court (and, presumably, the predecessor trial judge) made inadequate findings in allowing defendant to represent himself, but at the pretrial hearing the predecessor trial judge explicitly stated that she had no "doubt in [defendant's] competence . . . ." Viewed in context, the transcripts from both the pretrial conference and the first day of trial reveal adequate compliance with both *Anderson* and MCR 6.005(D).[3]

Defendant contends that the trial court failed to comply with MCR 6.005(E), which states:

> **(E) Advice at Subsequent Proceedings.** If a defendant has waived the assistance of a lawyer, the record of each subsequent proceeding (e.g., preliminary examination, arraignment, proceedings leading to possible revocation of youthful trainee status, hearings, trial, or sentencing) need show only that the court advised the defendant of the continuing right to a lawyer's assistance (at public expense if the defendant is indigent) and that the defendant waived that right. Before the court begins such proceedings,
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> (1) the defendant must reaffirm that a lawyer's assistance is not wanted; or
>
> (2) if the defendant requests a lawyer and is financially unable to retain one, the court must appoint one; or
>
> (3) if the defendant wants to retain a lawyer and has the financial ability to do so, the court must allow the defendant a reasonable opportunity to retain one.

Defendant indicates that the trial court should have reaffirmed his desire to represent himself on every day of trial. However, the rule clearly treats a "trial" as one proceeding, so there was no error. Defendant does not make any specific argument about sentencing or other proceedings.

> It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow. [*Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).]

At any rate, we are remanding this case, as discussed *infra*, for further proceedings regarding sentencing.

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[3] Defendant complains that the court never "explained if there was a mandatory minimum sentence as required by MCR 6.005(D)(1)," but defendant does not indicate that any mandatory minimum sentence applied to his case.

Defendant raises several issues relating to discovery but, in conjunction with his arguments, does not cite any cases relating to discovery. Nor does he cite any pertinent cases regarding his arguments concerning jury instructions, concerning the trial court's decision to revisit its earlier ruling about an incident in the jail, concerning the admission of photographs and a redacted document,[4] or concerning the failure to subpoena a witness. Defendant has thus abandoned these issues. *Id.*; *People v Bosca*, 310 Mich App 1, 16; 871 NW2d 307 (2015). Nevertheless, we have reviewed the issues and found that they do not require reversal. Defendant also argues that the trial court improperly limited his cross-examination of certain witnesses. Defendant cites cases relating to the standard of review for this issue. Even assuming that the issue has been properly briefed, we have reviewed it and found it to be without merit. The trial court properly limited cross-examination to the relevant event and the subject of the testimony provided by the witnesses.[5]

We do agree with defendant that this case must be remanded in connection with sentencing.[6] Defendant's charge reflected a third-offense habitual offender enhancement. Although the trial court seemed, at sentencing, to accept that it would be sentencing defendant as a third-offense habitual offender, the judgment of sentence sets forth a fourth-offense enhancement. In addition, the trial court appears to have applied the law applicable to fourth-offense enhancements because the court referred to "doubling" the highest minimum sentence under the guidelines, going from a range of zero to 25 to a range of zero to 50.[7] See MCL 777.21(3)(c). We remand this case for the trial court to (1) ensure that defendant was sentenced as a third-offense habitual offender and not a fourth-offense-habitual offender;[8] (2) correct the judgment of sentence to reflect that defendant has been sentenced as a third-offense habitual

[4] Defendant makes no argument regarding why the introduction of these items was improper and even goes on to state that "[d]efendant acknowledges the court has a duty to control the proceedings and has a duty to ensure that evidence is submitted as [sic] relevant to the case and the issues at hand." In addition, defendant's argument that the trial court failed to rule on the admission of the redacted document is simply not correct; the court stated that it would admit the document "over objection." While defendant continued to argue, the court stated, "Thank you," essentially indicating that it was not changing its ruling.

[5] Contrary to defendant's argument, he has demonstrated no basis for reversal due to "cumulative error."

[6] The prosecution agrees that a remand is necessary for certain sentencing matters, but argues that the trial court sentenced defendant as a third-offense habitual offender. As noted *infra*, this is not clear from the record.

[7] The court stated, "as a third habitual offender the top of the minimum range is doubled . . . ."

[8] Resentencing may or may not be required.

offender, not a fourth-offense habitual offender; and (3) recalculate the jail credit to which defendant is entitled for time served.[9]

SUPPLEMENTAL BRIEF

In a supplemental brief filed in propria persona, defendant argues that the trial court denied him due process because it allowed the prosecution to present false evidence to the jury. Whether a defendant's right to due process was violated is a question of law reviewed de novo. *People v Walker*, 234 Mich App 299, 302; 593 NW2d 673 (1999).

It is a violation of the Due Process Clause for the prosecution to allow false testimony from a state's witness to stand uncorrected. *People v Smith*, 498 Mich 466, 475; 870 NW2d 299 (2015). Likewise, a prosecutor may not knowingly use false evidence to obtain a conviction. *Id*. at 475-476. Defendant contends that a police report, photographs of defendant, a document from the Michigan Department of Corrections, a report from Detroit Receiving Hospital, and the testimony of Officer Michael Bridson were false evidence or false testimony. However, defendant provides no evidence of falsity. Thus, defendant has failed to demonstrate error requiring reversal. See *People v Elston*, 462 Mich 751, 762; 614 NW2d 595 (2000) (an appellant bears the burden of demonstrating the factual basis for appellate claims).

Defendant also argues that admitting documents into evidence violated his right to confront his accusers because the authors were not present to be cross-examined. However, defendant fails to specify to which documents he objects on this basis and fails to provide a meaningful analysis of this issue. Thus, the argument is abandoned. See *Mitcham*, 355 Mich at 203.

Next, defendant asserts that the trial court denied his motion for a new trial in violation of MCR 6.431(B) by failing to state a reason for the denial on the record. Defendant is correct that MCR 6.431(B) requires a trial court to state the reason for granting or denying a motion for a new trial. However, defendant does not explain why the court's technical violation of this court rule violates due process or otherwise entitles him to a new trial. Thus, defendant has failed to demonstrate any error entitling him to relief and has abandoned any claim of error by failing to brief its merits. See *Mitcham*, 355 Mich at 203.[10]

Defendant argues that the trial court failed to provide him with an investigator as it allegedly promised. However, defendant fails to cite the record in relation to the trial court's

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[9] The record is simply not clear regarding whether defendant was properly credited for time served. We also note that no matters related to *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2016), are at issue in this appeal.

[10] We reject defendant's assertion that because the prosecution did not respond to the motion for a new trial, defendant's allegations contained in the motion must be accepted as true. To the extent the case defendant cites could be interpreted as supporting this assertion, we note that the 1973 case is not strictly binding on us under MCR 7.215(J).

alleged promise to appoint an investigator. Further, defendant abandons this issue by providing no meaningful analysis regarding how an investigator would have aided him. *Id*. Defendant also asserts that the prosecutor violated the *Brady*[11] rule by failing to timely produce allegedly exculpatory evidence in the form of the "alleged drugs" he was accused of possessing. First, defendant has produced no evidence that the substance was exculpatory. *Elston*, 462 Mich at 762. In addition, the court offered defendant the opportunity to inspect the drugs at trial. Finally, defendant contends that the prosecution and the trial court had an improper ex parte conversation before trial. Defendant does not provide a sufficient factual basis for this claim[12] and fails to adequately argue in what way the alleged conversation constituted a critical stage of the proceedings; reversal is unwarranted. *Id*.; *Mitcham*, 355 Mich at 203; see also *United States v Barnwell*, 477 F3d 844, 850 (CA 6, 2007) (discussing communication during a "critical stage" of proceedings).[13]

Defendant's conviction is affirmed and this case is remanded for further sentencing proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Patrick M. Meter
/s/ Christopher M. Murray

[11] *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

[12] He states that this conversation occurred on May 21, 2015, but the register of actions shows no proceedings on that date.

[13] Defendant's argument seems to be premised on speculation; he states, "some other communication was going on between the judge and the prosecutor outside [defendant's] presence."